

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES,

Plaintiff,

vs.

No. 15-cr-4268-021-JB

ANTHONY RAY BACA, et al.,

Defendants.

TRANSCRIPT OF PROCEEDINGS
Sentencing - Anthony Ray Baca
June 12, 2019
11:30 AM
United States Federal Courthouse
100 N. Church
Las Cruces, New Mexico 88001

BEFORE: HONORABLE JAMES O. BROWNING
UNITED STATES DISTRICT JUDGE

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A P P E A R A N C E S

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THERESA M. DUNCAN

MARC M. LOWRY

1 [IN OPEN COURT AT 11:30 AM.].

2 THE COURT: All right. Good morning,
3 everyone. Appreciate everybody making themselves
4 available to me.

5 We're here in the matter of United States of
6 America vs. Anthony Ray Baca, Criminal
7 15-cr-4268-021-JB.

8 MS. ARMIJO: Your Honor, Maria Armijo and
9 Randy Castellano on behalf of the United States.

10 THE COURT: All right. Ms. Armijo,
11 Mr. Castellano, good morning again to you.

12 And for the defendant.

13 MS. DUNCAN: Your Honor, Theresa Duncan and
14 Marc Lowry appearing on behalf of Mr. Baca.

15 THE COURT: All right. Ms. Duncan,
16 Mr. Lowry, Mr. Baca, good morning to you.

17 Mr. Baca, have you reviewed the -- what
18 probation did was they did two PSRs in your matter. On
19 the second one, the one that was disclosed on June 6th,
20 which I think was last week, they did a little cover
21 memo to show the changes on it, and then they,
22 yesterday, issued an addendum to reflect the objections
23 that were filed on Monday night.

24 Have you reviewed those three documents and then
25 the memo that covers the -- what I'll call the

1 operative PSR?

2 THE DEFENDANT: Yes, Your Honor, I'm
3 reviewing them right now.

4 THE COURT: All right. Do you need more
5 time to review them? We can take time to do them,
6 because they're important.

7 MS. DUNCAN: Your Honor, if we could have a
8 little bit more time.

9 THE COURT: Yes, just tell me when you're
10 ready. And does he know what I'm talking about?
11 There's the PSR back in early May, and then the one on
12 the 6th has a little cover memo that shows the changes
13 to the one in May, so it kind of summarizes it, and
14 then the addendum that came out yesterday about the
15 objections that were filed.

16 THE DEFENDANT: That's what I have here.

17 THE COURT: All right. Just tell me when
18 you're ready.

19 MS. DUNCAN: Thank you, Your Honor.

20 [Discussion off the record.]

21 MS. DUNCAN: Your Honor, we're ready to
22 proceed whenever.

23 THE COURT: All right. Going back to my
24 questions, Mr. Baca, have you now had a chance to
25 review the May presentence report, the June 6th

1 presentence report with the cover memo from Mr. Mills
2 summarizing what had been changed, as well as the
3 addendum that came out yesterday?

4 THE DEFENDANT: I have, Your Honor.

5 THE COURT: And Ms. Duncan and Mr. Lowry,
6 have you had a chance to review the two presentence
7 reports, Mr. Mills' memo and then the addendum that
8 came out yesterday?

9 MS. DUNCAN: We have, Your Honor.

10 THE COURT: All right. And I understand
11 that you have two objections, but no others, to the
12 presentence report; is that correct?

13 MS. DUNCAN: Yes, Your Honor. We have like
14 sort of a general objection just to the extent that the
15 presentence report was relying on investigative reports
16 instead of trial testimony. But other than that, we
17 have one objection that has a factual and legal basis;
18 and the second, it's not so much of an objection as it
19 is a request for a variance.

20 THE COURT: You know, I've had this
21 objection about probation relying on the discovery
22 materials, and I thought I had made it clear that I
23 wanted them to go back and review the trial
24 transcripts, but -- and the other probation officers
25 did. I guess in this case, it didn't get done.

1 But having reviewed the guts of this PSR now 10
2 or 12 times in the other cases, it did all match up
3 with the trial testimony. In those cases where it
4 didn't, the probation officer would change it.

5 So my reading of the PSR, with the help of
6 probation, also my reviewing of the transcript itself,
7 I didn't see any particularly factual mistakes in the
8 PSR. Is there some that you want to have particularly
9 changed?

10 MS. DUNCAN: Your Honor, I think that the
11 one that matters the most for us is the one that -- the
12 summary of the statements of Jerry Armenta, which
13 probation is relying on to support its allegation that
14 the vulnerable victim enhancement applies.

15 THE COURT: All right. And which particular
16 paragraph is that, or paragraphs?

17 MS. DUNCAN: That is paragraph 22, Your
18 Honor.

19 THE COURT: Okay. What do you want to do
20 with that? Are you going to deal with these
21 objections, Ms. Armijo?

22 MS. ARMIJO: Yes, Your Honor. The only
23 thing I think that deals with Mr. Baca is the first
24 couple of paragraphs -- sentences. We're referring to
25 paragraph 22, correct?

1 THE COURT: Correct.

2 MS. DUNCAN: Yes.

3 MS. ARMIJO: And the only thing that I would
4 suggest, Your Honor, is that we put -- I guess the ELMO
5 is not up. That's okay. I can just say it.

6 MS. BEVEL: I can turn it on, if you want.

7 MS. ARMIJO: It says, "Anthony Ray Baca,
8 'Pup,' the recognized leader of the SNM," and instead
9 of "somehow obtained a copy," I was going to suggest we
10 put "was aware of a police report prepared by the
11 police department which reflected JM had provided
12 information in aid to."

13 Because -- and the basis for that is not so much
14 Armenta, but in reviewing the transcripts of
15 Mr. Urquizo and Mr. Rodriguez -- I can get my notes.
16 There's several statements -- there was testimony, and
17 I looked at the record where there was testimony that
18 the defendant had indicated that he knew Spider had the
19 paperwork, "Cheech told me."

20 And then another time he says -- and this is the
21 Rodriguez transcript -- Cheech told him on the phone
22 that he gave it to Calbert, referring to the paperwork.

23 And Mr. Urquizo testified that Pup told him that
24 there was paperwork on Javier and that he needed to be
25 hit and to take care of it when he went down south.

1 And so -- and in another conversation that
2 Mr. Urquizo had with Calbert, he told him, "Pup wants
3 this done." And he said, "Yeah, I know that."

4 So I think there is indication that -- although
5 I don't know that we had any direct testimony that
6 Mr. Baca had paperwork, there was clearly testimony
7 that the defendant was aware of the paperwork and spoke
8 about the paperwork.

9 So by changing it to "somehow obtained a copy
10 of" to "was aware of," I think that would take care of
11 it.

12 THE COURT: All right. And the rest of that
13 paragraph of what Armenta testified to, is that
14 consistent with your memory and record of what he
15 testified to?

16 MS. ARMIJO: It's my recollection that it
17 is. And I did not have an opportunity to last night go
18 over Armenta's testimony, but it appears that probation
19 did review the testimony, because in the next
20 several -- in the next three paragraphs, they talk
21 about testimony. And we did provide them with
22 transcripts so that they could review it.

23 THE COURT: All right. And, Mr. Mills, is
24 that what you're trying to say here, is that this was
25 your review of the transcript?

1 MR. MILLS: That's correct, Your Honor.

2 THE COURT: The trial transcript?

3 MR. MILLS: When it was brought up in a
4 previous case, a coworker did go back, and we did amend
5 reports.

6 I didn't have an opportunity to go back
7 specifically to those points that defense counsel just
8 objected to. So specifically to the points of those
9 statements, I wasn't able to go back and look at those
10 specific statements.

11 THE COURT: But when you wrote paragraph 22,
12 you were looking at the trial transcript?

13 MR. MILLS: I believe it indicates in
14 paragraph 21 which ones we were referring to when we
15 started talking about relating to the trial testimony.
16 So beginning at paragraph 21 is when we started
17 beginning looking at the trial transcripts.

18 THE COURT: Okay. All right. With that
19 change, Ms. Armijo, suggest -- would that be sufficient
20 for you, Ms. Duncan?

21 MS. DUNCAN: Your Honor, it would. We
22 obviously maintain Mr. Baca's innocence.

23 THE COURT: Oh, yes.

24 MS. DUNCAN: But I agree with Ms. Armijo,
25 that that testimony was elicited at trial, "was aware

1 of."

2 THE COURT: So we will make the change.
3 We'll take out "somehow obtained" -- we'll take out the
4 words "somehow obtained" and just put "was aware of a
5 copy," and then the rest of the paragraph would remain
6 the same.

7 MS. DUNCAN: There's actually another
8 objection that we have. So it's the sentence -- five
9 lines down, it says, "After receiving this report,
10 Baca, who is housed at the Penitentiary of New Mexico
11 in Santa Fe, declared JM was to be murdered in his cell
12 at SNMCF."

13 And our objection was there was never any
14 testimony by any witness that Mr. Baca ordered that
15 Mr. Molina be killed in his cell.

16 THE COURT: Do you have any record on that,
17 Ms. Armijo?

18 MS. ARMIJO: Your Honor, I don't have any
19 recollection of the "in his cell part." Certainly
20 there was a lot of testimony --

21 THE COURT: That's what your objection is
22 specifically to "in his cell," right?

23 MS. DUNCAN: That's right, Your Honor. And
24 we acknowledge there are many witnesses who said that
25 Mr. Baca authorized the hit, and we dispute that, but

1 we acknowledge --

2 THE COURT: So if we put a period after
3 "declared JM was to be murdered," that would be
4 sufficient for you?

5 MS. DUNCAN: It would.

6 THE COURT: And do you have any --

7 MS. ARMIJO: I know there was testimony that
8 he was to be murdered at SNMCF, because he specifically
9 told Mr. Urquizo, "Take care of it when you go down."

10 THE COURT: So can I just take out the three
11 words "in his cell"? And is that sufficient,
12 Ms. Duncan?

13 MS. DUNCAN: Yes, Your Honor, that is
14 sufficient.

15 THE COURT: And you can live with that,
16 Ms. Armijo?

17 MS. ARMIJO: Yes, Your Honor.

18 THE COURT: All right. So we'll take out
19 the words "in his cell," but leave in the words "in
20 SNMCF."

21 All right. Any other factual objections before
22 we take up the legal objections, Ms. Duncan?

23 MS. DUNCAN: I think the only other factual
24 objection that we had outstanding -- it doesn't really
25 go to any of the adjustments -- is in paragraph 26. It

1 says, "In summary, Herrera ordered the murder of JM
2 after receiving instructions from Baca, a high-ranking
3 member of the gang."

4 Our objection is simply that there was never any
5 evidence that Mr. Herrera communicated directly with
6 Mr. Baca. We understand that there was evidence of
7 kind of a chain from Mr. Baca to one person to the next
8 person, but there was no testimony or evidence of a
9 direct conversation between those two.

10 MS. ARMIJO: Can we change that to "after
11 receiving the paperwork," and if we need to put "the
12 paperwork," we can put it in parentheses.

13 So it would read, "In summary, Herrera ordered
14 the murder of JM after receiving the paperwork," in
15 lieu of "after receiving instructions from Baca."

16 THE COURT: Would that be better?

17 MS. DUNCAN: It would, Your Honor.

18 THE COURT: All right. So we'll make that
19 change. And these are all all right with you,
20 Mr. Mills?

21 MR. MILLS: Yes.

22 MS. DUNCAN: Just to make that sentence make
23 sense, I think you'd also have to remove the next
24 clause, "a high-ranking member of the gang."

25 MS. ARMIJO: Oh, yes.

1 THE COURT: All right. We'll make that
2 change, as well.

3 MS. DUNCAN: Actually --

4 MS. ARMIJO: "Who was housed at PNM."

5 MS. DUNCAN: So it would just be, "In
6 summary, Herrera ordered the murder of JM after
7 receiving the paperwork," period.

8 THE COURT: That's agreeable with you,
9 Ms. Armijo?

10 MS. ARMIJO: Yes, Your Honor.

11 THE COURT: And that's agreeable with you,
12 Mr. Mills?

13 MR. MILLS: Yes, Your Honor.

14 THE COURT: All right. So before we take up
15 the legal objections, any other factual objections to
16 the PSR or to the addenda which addressed some of your
17 other objections?

18 MS. DUNCAN: I'm sorry, if I could have just
19 one moment, because I think there was an additional --
20 I guess the only other objection we have is to the
21 addendum that was filed on the 6th.

22 Probation added additional information to
23 pages 11 and 25, paragraphs 26 and 119. So we, as you
24 know, have objection to this characterization of
25 Mr. Molina as a vulnerable victim, which we're going to

1 argue. And so we'd object to this new language
2 characterizing him as such.

3 THE COURT: Okay. Why don't we come back.
4 I'll hold that, and then you can -- after we resolve
5 the legal issue, the guideline calculation, I'll try to
6 remember to give you an opportunity to clean up the
7 record, if I sustain your objection. And then if I
8 overrule it, you can tell me if there's still some
9 objection to the factual portion.

10 All right. Any other factual issues you see or
11 can think of?

12 MS. DUNCAN: I think that's all of our
13 factual objections.

14 THE COURT: All right. I have given thought
15 to the factual -- to the legal objections to the
16 "vulnerable victim." I can let you argue that, or you
17 can hear my thoughts and then have something to shoot
18 at.

19 Do you have a preference, Ms. Duncan.

20 MS. DUNCAN: I'd love to hear your thoughts
21 first, Your Honor.

22 THE COURT: All right. So I looked at the
23 objections. I didn't get them on Monday night, so I
24 started looking at these yesterday, but I do have some
25 thoughts on that.

1 So the primary issue as to the first objection
2 in the objection is whether the two-level adjustment
3 for a vulnerable victim under Section 3(a)1.1 of the
4 guidelines applies where Mr. Baca was not present at
5 Mr. Molina's murder. And according to Mr. Baca, there
6 was no evidence that he was involved in ordering,
7 planning or directing the details of Mr. Molina's
8 murder. And that's in objection paragraph 6 at page 3.

9 I'm inclined to think that a preponderance of
10 the evidence establishes that Mr. Baca knew or should
11 have known that Mr. Molina was particularly vulnerable
12 to being murdered because of Mr. Molina's cooperation
13 with law enforcement, Mr. Baca's order that Mr. Molina
14 be killed and Mr. Molina's incarceration with fellow
15 SNM members who knew of his cooperation and the order
16 for his death.

17 The PSR applies a two-level adjustment for a
18 vulnerable victim because Mr. Molina "became
19 susceptible to injury or death when other SNM members
20 became aware he cooperated with law enforcement and he
21 was subsequently placed in a correctional facility with
22 other SNM members after a green light was placed on
23 him, which meant he was to be killed." That's
24 paragraph 26 that we've been discussing.

25 And what I understand Mr. Baca's objection to be

1 is to the PSR's characterization of Mr. Molina as a
2 vulnerable victim stating that -- and I'm quoting
3 Mr. Baca here -- "There is zero evidence that
4 Mr. Molina was" -- I believe that's supposed to be
5 "unusually vulnerable due to age, physical or mental
6 condition or was otherwise particularly susceptible to
7 the criminal conduct." And that's tracking the
8 language -- quoting the language of application note to
9 Section 3(a)1.1.

10 Mr. Baca contends that -- and I'm quoting
11 again -- "Mr. Molina's status as an inmate living in
12 prison is legally insufficient to justify application
13 of this enhancement, and that the attack's location,
14 standing alone, is also an improper basis to find a
15 victim vulnerable." That's in paragraph 5 of his
16 objections.

17 And then Mr. Baca argues that he certainly did
18 not know nor should he have known where within the
19 prison Mr. Molina's murder would take place and asserts
20 that there is no evidence that he was involved in
21 ordering planning or directing the details of
22 Mr. Molina's murder.

23 I agree that the fact that Mr. Molina was an
24 inmate at the time of his murder and that he was killed
25 in his prison cell are not proper bases, without more,

1 to conclude that Mr. Molina was a vulnerable victim.
2 The two-level adjustment for a vulnerable victim
3 applies where the victim of the offense is "unusually
4 vulnerable due to age, physical or mental condition or
5 who is otherwise particularly susceptible to the
6 criminal conduct, and that the defendant knows or
7 should have known of the victim's unusual
8 vulnerability." Again, that's application note 2.

9 And then application note 2 underscores that
10 Section 3(a)1.1(b) applies to offenses involving an
11 unusually vulnerable victim in which the defendant
12 knows or should have known of the victim's unusual
13 vulnerability.

14 For example, in United States vs. Tapia, the
15 United States Court of Appeals for the Eleventh Circuit
16 reviewed the District Court's decision that an
17 incarcerated government informant whom other prisoners
18 assaulted was a vulnerable victim for Section 3(a)1.1's
19 purposes. The Eleventh Circuit found no error in the
20 application of the adjustment to the appellant's
21 convictions under 18 USC Section 1513, which were
22 retaliating against a witness, victim or informant
23 determining that the District Court "correctly
24 concluded that the victim, as an individual, was
25 particularly vulnerable by virtue of his incarceration

1 with appellants and his inability to escape and that
2 the victim was targeted because of this vulnerability."

3 In United States vs. Lambright, the United
4 States Court of Appeals for the Fifth Circuit upheld
5 USSG Section 3(a)1.1 application where a corrections
6 officer killed an inmate. The District Court concluded
7 there that the inmate was a vulnerable victim because
8 "he was completely dependent upon the care of the
9 corrections officers, was locked in his cell prior to
10 the assault, and he could not protect himself from the
11 assault."

12 The United States Court of Appeals for the Tenth
13 Circuit has explained that the vulnerable victim
14 enhancement "should apply when the victim is" -- and
15 I'm quoting because it's quoting another case -- "when
16 the victim is less able to resist than the typical
17 victim and requires greater societal protection."

18 That's from United States vs. Scott, which was
19 quoting United States vs. Castenada, a Ninth Circuit
20 case, and then also quoting United States vs. Profitt,
21 a Tenth Circuit case.

22 The Tenth Circuit underscores that the
23 adjustment is "reserved for exceptional cases in which
24 the victim is unusually vulnerable or particularly
25 susceptible to the crime committed where the victims

1 are 'unable to protect themselves.'" That's from the
2 Proffit case in the Tenth Circuit.

3 "There's no requirement, however, for the
4 sentencing court to find that the defendant
5 intentionally targeted the victim because of the
6 victims's vulnerability to apply the adjustment." And
7 that's from the Chicora case from the Tenth Circuit.

8 "Further, in assessing vulnerability, the
9 sentencing court must make an individualized
10 determination. It's not enough that a victim belongs
11 to a class generally considered vulnerable." And
12 that -- the Scott case, the Proffit case, and another
13 Tenth Circuit case, Hardesty, make that clear.

14 Now, here, there was testimony -- and I think
15 the government may -- is going to, with their remarks,
16 supplementing it with additional specific cites to the
17 record. But here's what I have seen from our review of
18 the record.

19 There was testimony that there was paperwork
20 being passed around on Mr. Molina containing a
21 statement he had made to the Las Cruces Police
22 Department. That was from the cross-examination of
23 Rubio that was taken on February 2nd, 2018.

24 And then the government elicited similar
25 testimony from Calbert. David Calbert testified that

1 Joe Martinez told him that Mr. Baca wanted Calbert to
2 take the paperwork to the Southern New Mexico
3 Correctional Facility -- and I'll call it Southern from
4 now on -- and Mr. Beck got that from Calbert on
5 February 2nd.

6 And then Guadalupe Urquizo testified about a
7 discussion he had with Mr. Baca in which Mr. Baca told
8 him about the paperwork on Mr. Molina and stated that
9 Mr. Molina needed to be killed.

10 Mr. Urquizo said that Mr. Baca wanted him to
11 carry this information to Southern. And Mr. Beck
12 elicited that testimony on direct on February 5th,
13 2018.

14 Mr. Urquizo also testified that when he was
15 moved to the Penitentiary of New Mexico, PNM South
16 facility, Mr. Calbert showed up, stated that he had
17 Mr. Molina's paperwork and said, "Pup wants this done."
18 That was Urquizo's testimony, and he pretty -- he said
19 that several times in different ways.

20 Mr. Urquizo stated that Mr. Calbert gave him
21 Mr. Molina's paperwork, that he took Mr. Molina's
22 paperwork to Southern, and that -- I don't have the
23 transcript in front of me, but was Urquizo saying that
24 Mr. Baca knew that the paperwork and the hit meant
25 Molina would be murdered.

1 Okay. I didn't have a person there. But my
2 clerk is telling me that that transcript -- I don't
3 have it in front of me. The transcript says that
4 Mr. Urquizo testified that Mr. Baca knew that the
5 paperwork and the hit meant Mr. Molina would be
6 murdered. That was February 5th testimony.

7 So the Court is inclined to conclude that
8 Mr. Baca not only advocated for Mr. Molina's murder,
9 but he knew and wanted other SNM members to know that
10 Mr. Molina had cooperated with law enforcement.

11 Other testimony that I think is relevant to this
12 issue was Mr. Molina was an SNM member and was housed
13 in Southern in a pod full of other SNM members.

14 Let's see. Mr. Blanco testified on February 6th
15 that he stated that Mr. Molina was an SNM member living
16 in an SNM pod. We then had quite a bit of testimony
17 that the SNM prohibits its members from cooperating
18 with law enforcement and puts hits on those who do
19 cooperate to be murdered.

20 Likewise, those who do not act on hits as
21 ordered are also murdered. We got that testimony from
22 Mr. Rubio several times. Mr. Baca knew that his
23 spreading word that Mr. Molina had cooperated with law
24 enforcement and needed to be murdered, especially
25 considering Mr. Baca's high position in the SNM, would

1 increase Mr. Molina's particular susceptibility to
2 being murdered. Mr. Molina's incarceration in a pod
3 with SNM members who knew of his cooperation and the
4 order that he be killed also increased this
5 vulnerability.

6 Mr. Urquizo stated that Mr. Baca is the SNM's
7 leader. Mr. Blanco stated that Mr. Molina was housed
8 in an SNM pod.

9 On February 7th, Ms. Armijo got Mr. Rodriguez to
10 provide that some of Mr. Molina's murderers were housed
11 near him. Mr. Rodriguez also stated that Mr. Molina
12 was a rat, which is not allowed in the gang.

13 In United States vs. Tapia, it found that the
14 victim was vulnerable, in part, because of his
15 incarceration with the defendants.

16 Then we had testimony that Mario Rodriguez,
17 Timothy Martinez, Jerry Armenta and Jerry Montoya
18 entered Mr. Molina's cell with shanks with the sole
19 purpose of carrying out the hit on Mr. Molina.

20 And in United States vs. Pierce, which is a
21 Tenth Circuit, it's stated that USSG Section 3 at
22 1.1(b)(1) is justified where "The defendant selected
23 and targeted this particular victim for the offense
24 because of unusual circumstances."

25 Then there was testimony that Mr. Armenta and

1 Mr. Montoya stabbed Mr. Molina 43 times, ensuring that
2 Mr. Molina would not survive the assault and would die
3 pursuant to the hit on him.

4 So the Court is inclined to conclude that
5 Mr. Baca knew that Mr. Molina was a vulnerable victim
6 because of Mr. Molina -- and these are the key facts
7 that I think push this across the board, across the
8 line into "vulnerable victim," because of Mr. Molina's
9 cooperation with law enforcement -- this is what
10 Mr. Baca knew -- the order for his murder and his
11 incarceration with other SNM members who had to act on
12 the hit or be murdered themselves.

13 And so I'm inclined to overrule Mr. Baca's
14 objection and apply Section 3(a)1.1's two-level
15 adjustment for vulnerable victim.

16 I want to hear, of course, from Mr. Baca about
17 that. But I know the government was scrambling to look
18 for testimony to support the "vulnerable victim."

19 I assume you're going to argue in support of
20 what probation did. But anyway, why don't I hear from
21 the government. What's your position? And did you
22 find other testimony that you think I ought to consider
23 and Mr. Baca ought to consider in this "vulnerable
24 victim"?

25 MS. ARMIJO: Your Honor, we do agree with

1 probation. We agree you did find several of the places
2 that I was looking at.

3 I know that when you had asked your law clerk as
4 to if there was -- I believe on page 37 of Urquizo,
5 transcript, he said specifically that "Pup said there
6 was paperwork and that Javier needed to be hit and to
7 take care of it when he went down there."

8 THE COURT: And there was testimony that
9 Mr. Baca knew that?

10 MS. ARMIJO: Yes, that, "Pup said there was
11 paperwork and that he needed to be taken care of." So
12 we did have that directly. I know that you had
13 indicated -- but we do have that directly.

14 The other thing that I think we could add as to
15 Mr. Molina being vulnerable is, if you may recall,
16 there was testimony from Timothy Martinez that his
17 whole job was to subdue Mr. Molina in his cell, and he
18 went in and he gave him a shot to knock him out. And
19 so before the stabbing began, the plan was to knock him
20 out in his cell and that they were also going to be
21 doing drugs.

22 I don't know that Mr. Molina actually -- and I
23 don't recall if he -- I don't think he actually ever
24 got to ingest the drugs, but that was the plan they
25 were going to do. But we do know that he was knocked

1 down by Mr. Martinez as well. So there was some sort
2 of incapacitating him as well.

3 THE COURT: Was there evidence, though, by
4 Mr. Martinez linking Mr. Baca to knowing those details
5 of the murder?

6 MS. ARMIJO: No, Your Honor. There was not
7 specifically that Mr. Baca would know those specific
8 details. I think, as to that, we would just say that
9 it was foreseeable that it would be in a cell, given
10 that they are in a prison setting, and every single SNM
11 murder that occurred up to that time had been done in a
12 cell.

13 If you think about the 2001 murders, the Freddy
14 Sanchez murders, all of those had been -- were
15 committed at Southern and in a cell. I can't think of
16 an SNM murder since Mr. Baca was the leader that
17 occurred outside of a cell. No, I know that Mr. Baca's
18 murder was not in a cell, that he committed.

19 But that's why I was very specific as to
20 anything since he was the leader afterward when these
21 people were committed, especially all the murders at
22 Southern. They were killed in cells.

23 So I think it was certainly foreseeable. He was
24 specific that he be killed -- he knew he was at
25 Southern, so it would be foreseeable to him, as well.

1 THE COURT: All right. Thank you,
2 Ms. Armijo.

3 Ms. Duncan, are you going to argue in support of
4 this objection?

5 MS. DUNCAN: I am, Your Honor.

6 THE COURT: All right, Ms. Duncan.

7 MS. DUNCAN: Just to speak to Ms. Armijo's
8 last point about Mr. Baca ordering the hit be done at
9 Southern, you know, Mr. Baca had no control over where
10 Mr. -- and just for the purposes of this argument, Your
11 Honor, I'm going to assume the truth of everything that
12 you just summarized in terms of testimony.

13 THE COURT: Right. And I should say, in
14 making that, I'm crediting these portions of the men
15 that testified what they said. I don't have to credit
16 everything they said. But at least on these particular
17 points that I looked at, I was crediting that
18 testimony.

19 MS. DUNCAN: I understand, Your Honor.

20 THE COURT: And I understand that you're not
21 finding them credible even on these points.

22 MS. DUNCAN: Right. But I agree that the
23 Court accurately summarized their testimony.

24 So with respect to Southern New Mexico
25 Correctional Facility, Mr. Baca had no control over

1 where Javier Molina resided. So, you know, accrediting
2 the testimony that he ordered him to be hit, if
3 Mr. Molina had been living on the streets and the order
4 would have been "kill him on the streets," or if he had
5 been at PNM, it would have been there. It was really
6 just -- it was to hit Mr. Molina, location being just
7 irrelevant, ancillary to that order.

8 And I think that that's sort of what
9 distinguishes this case from some of the other cases
10 that the Court was talking about. In Tapia, the
11 witness -- the person who was killed was actually
12 brought into that pod to testify at a particular trial.
13 So he was particularly vulnerable because he was
14 brought in solely for that purpose.

15 Here, we have Mr. Molina was living at Southern
16 New Mexico Correctional Facility. He was placed there
17 by virtue of his own actions and his own incarceration.
18 So he wasn't there for a specific purpose that was
19 related to Mr. Baca. He was there because he had been
20 convicted of a crime and sentenced to incarceration.

21 It's also different from the correctional
22 officer case because, in there, the vulnerability stems
23 from the officer's relationship to the inmate. Right?
24 That the officers can put someone into a particularly
25 vulnerable location in a prison. They have the power

1 and control to prevent someone from reporting violence.

2 So here, Mr. Baca did not have any of that
3 control. He had no control over Mr. Molina whatsoever.
4 And there's a difference between having a motive to
5 kill someone or to have them be a victim of a crime and
6 being a vulnerable victim.

7 So, for example, the guideline is clear that
8 someone's status as a bank teller does not make them a
9 vulnerable victim for purposes of a bank robbery just
10 because there's a teller. There has to be something
11 else.

12 So in this case, crediting all the government's
13 evidence, Mr. Molina was an informant. He was a part
14 of a group, the rules of which were that informants get
15 hit. That was the motive for the murder, but that
16 didn't make him particularly vulnerable. Otherwise,
17 anytime someone has a motive to kill someone, to rob
18 them, to commit an offense, that person is vulnerable
19 because they're susceptible to the offense. But
20 there's nothing about Mr. Molina that made him
21 particularly susceptible. He wasn't physically infirm.
22 He wasn't placed by Mr. Baca or any other person, you
23 know, any other of the defendants into a vulnerable
24 position.

25 And with respect to this -- so his status just

1 as who he was is not enough for the vulnerable victim,
2 and the location of the hit is not enough for a
3 vulnerable victim because that's just where he lived.
4 It's -- we've heard that you -- that the way that the
5 SNM operated was you get a hit, you know, this person
6 needs to be taken care of, and they get taken care of
7 at your first opportunity. Whether it's in a yard, a
8 cell, on the street, it doesn't really matter. The
9 point is the hit. The point is the murder.

10 So -- and in terms of -- so we have -- with what
11 happened in that cell, the first is that I think, as
12 the government has acknowledged, Mr. Baca -- there's no
13 evidence that Mr. Baca had specific directions on how
14 anything was going to happen. And once you get into
15 the cell, I would note that there is an enhancement for
16 restraint, for physical restraint, and we haven't
17 objected to that because the evidence is that
18 Mr. Molina was restrained, and that enhancement does
19 not include a mens rea component. It doesn't matter
20 whether Mr. Baca knew or should have known that he was
21 going to be restrained. It's the simple fact of the
22 restraint.

23 But the vulnerable victim is different. There
24 would have to be some knowledge that he knew Mr. Molina
25 was going to be hit in a place that he could not flee

1 from or that there was some other specific
2 circumstances.

3 So here, you know, Mr. Molina was not selected
4 or targeted because of unusual circumstances. You
5 know, crediting the government's evidence, he was
6 selected or targeted exactly because that's the way
7 that the SNM operated and, you know, according to
8 rules, that he himself signed onto.

9 And, Your Honor, I think that is -- yeah, I
10 think that's my argument.

11 THE COURT: All right. Thank you,
12 Ms. Duncan.

13 Ms. Armijo, your arguments in response to the
14 objection?

15 MS. ARMIJO: Your Honor, the only other
16 thing that we would add is it was very specific.
17 Although there was the hit that was outstanding, as to
18 Mr. Urquizo, it was very specific because he knew that
19 Mr. Urquizo was going down to Southern.

20 So it wasn't as if Mr. Baca knew that the
21 defendant had a hit and it was a hit on site -- because
22 we did have testimony about that. If you see somebody
23 on the street, you know, like Julian Romero, that you
24 would hit them anywhere.

25 But this was very specific from Mr. Baca to

1 Mr. Urquizo, who was taking down the paperwork. He
2 said, "You're going down to Southern. You need to take
3 the paperwork down with you and make sure this gets
4 done."

5 He knew that Javier Molina was in a prison
6 setting. It wasn't a hit on site outside. He knew and
7 he instructed him that he was going to be going down
8 there.

9 The other thing that I would add that -- when
10 you were comparing it to the people that you depend on,
11 as far as correctional officers, in this case, although
12 there wasn't a correctional officer, I think that
13 Mr. Molina had probably -- he knew -- I think there was
14 testimony he knew that there was a hit out on him, but
15 the people that he was around, he trusted. He was
16 around his brother, his carnales, that he had trusted
17 and when they all set him up to go inside of his cell
18 to then start the stabbing, he went in there assuming
19 that they were going to be doing drugs, and he trusted
20 those people.

21 So although they weren't his caretakers, he went
22 into a small cell with at least three individuals that
23 he thought were his brothers, and he never saw this
24 coming. So, to that extent, he did trust those people.

25 That's what I would have to add, Your Honor.

1 THE COURT: All right. Thank you,
2 Ms. Armijo.

3 Ms. Duncan, I'll give you the last word on this
4 objection.

5 MS. DUNCAN: Thank you, Your Honor. I have
6 two points that I would like to make.

7 Yes, according to the government's evidence,
8 Mr. Baca knew that Mr. Urquizo -- I mean, Mr. Molina
9 was at Southern New Mexico Correctional Facility. But
10 I would just point out that Mr. Baca was with
11 Mr. Molina at Southern New Mexico Correctional Facility
12 where nothing happened. And the fact that it's a
13 prison setting is not enough for vulnerable victim.

14 And then with respect to Ms. Armijo's second
15 point, that he was around people he trusted who
16 betrayed him, that is undoubtedly true, but it's not
17 something that -- a circumstance -- the circumstances
18 of the killing itself is not something that Mr. Baca
19 knew or should have known.

20 THE COURT: All right. Thank you,
21 Ms. Duncan.

22 Well, certainly there could be more facts, but I
23 guess the facts that I think push this across the line
24 remain that -- I think the evidence supports that
25 Mr. Baca knew that Mr. Molina was a vulnerable victim

1 because of Mr. Molina's cooperation with law
2 enforcement, the order for his murder, and his
3 incarceration with other SNM members who had to act on
4 the hit or be murdered because of the culture of the
5 SNM.

6 So I think it's enough that Mr. Baca knew that
7 Mr. Molina would be killed because he's a rat and that
8 Mr. Molina was housed at Southern. And I do think
9 there's evidence to support that. And I think that's
10 enough to cross the line.

11 So I'm going to overrule the objection and apply
12 the two-level enhancement and concur with probation's
13 assessment on that.

14 Let me at this time confirm, then, the guideline
15 sentence, and we'll come back and talk about the
16 objection on the concurrent or consecutive.

17 So the offense level is 43, and the criminal
18 history category is 6. Pursuant to 5(g)1.1, the
19 guideline imprisonment term is 120 months as to Counts
20 6, 9 and 10.

21 As to Count 7, the guideline imprisonment range
22 is life, which is consistent with the statutory
23 provision of mandatory life imprisonment.

24 And I know you have an objection, but given the
25 Court's ruling on the objection, have I now stated

1 correctly the guideline sentence as well as the
2 statutory sentence, Ms. Duncan?

3 MS. DUNCAN: Yes, Your Honor, you have.

4 THE COURT: All right. Let me do this: I
5 don't want to -- I can do two things, if you want. I
6 can give you some very preliminary thoughts on the
7 consecutive/concurrent. And all I have really done at
8 this point is not decided on that or have an
9 inclination on that, but I just want to state what the
10 law is.

11 If you want to argue it without me stating that,
12 I can. Or if you'd like to see what my thoughts are on
13 the law and the guidelines, I can give those to you.
14 Which would you prefer?

15 MS. DUNCAN: Your Honor, Mr. Lowry is going
16 to argue that portion.

17 THE COURT: Do you want to hear my thoughts
18 on the law and the guidelines, or do you want to argue
19 them first?

20 MR. LOWRY: Your Honor, I always benefit
21 from the Court's wisdom. Thank you.

22 THE COURT: All right. Let me see if I can
23 help, and then we'll hear the substantive arguments.

24 What I understand is that Mr. Baca objects to
25 the application of USSG Section 5(g)1.3. So Mr. Baca's

1 federal sentence will run consecutively with his state
2 sentence because Mr. Baca was incarcerated and serving
3 a sentence for murder when he committed the federal
4 offenses for which he's being sentenced today.

5 The PSR describes that Mr. Baca was convicted of
6 murder in 1990 and sentenced to life imprisonment.
7 That's paragraph 115 at page 24.

8 Because Mr. Baca was serving this sentence when
9 he committed the federal offenses for which he's being
10 sentenced today, the probation office recommended that,
11 "As none of these prior convictions were utilized to
12 enhance the defendant's offense level under Chapters 2
13 or 3 of the United States Sentencing Guidelines, the
14 defendant's sentence for the instant offense shall run
15 consecutively to his undischarged term of imprisonment
16 in the State of New Mexico Docket D-202-CR1989-00415."
17 And again, that's paragraph 115.

18 Mr. Baca requests that the Court vary from
19 Section 5(g)1.3's application, asserting that his
20 current sentence from his state court conviction in
21 1989 for murder was used to prove an element of the
22 crimes here, whether Mr. Baca was involved in a
23 criminal enterprise called the SNM. That's paragraph 8
24 of his objections on page 4.

25 Mr. Baca underscores that the guidelines are

1 advisory and do not bind the Court. That's paragraph 9
2 on page 4. The probation office has -- Mr. Mills has
3 responded in the addendum, explaining that because the
4 State sentence "was not utilized to enhance the
5 defendant's offense level under Chapters 2 or 3 of
6 United States Sentencing Guidelines" or "used in
7 calculating the defendant's offense level, the
8 defendant's sentence for the instant offense shall run
9 consecutively to the aforementioned undischarged terms
10 of imprisonment." And that's what the addendum on
11 page 2 says.

12 Section 5(g) 1.3 provides that if the instant
13 offense was committed while the defendant was serving a
14 term of imprisonment, including a work release, furlow
15 or escape status, or after sentencing for, but before
16 commencing service of, such term of imprisonment, the
17 sentence for the instant offense shall be imposed to
18 run consecutively to the undischarged term of
19 imprisonment." That's Section 5(g) 1.3(a).

20 Mr. Baca does not dispute that he was
21 incarcerated when he committed the federal offenses for
22 which the Court is sentencing him today, and the record
23 supports that he was incarcerated when he committed the
24 federal offenses. The Court agrees with Mr. Baca that
25 it is not required to order that the sentence in this

1 case run consecutively to his State sentence, and the
2 Court notes that it may vary from Section 5(g) 1.3(a)
3 and impose this sentence concurrently rather than
4 consecutively.

5 So the guidelines -- I think Mr. Mills has
6 correctly stated the guidelines, but I think there's
7 also support for the fact I can vary from the
8 guidelines. I think Tenth Circuit case in the United
9 States vs. Mahalli and Schumacher support that.

10 Then turning to the statute, 18 USC
11 Section 3584, it also provides the Court with authority
12 to sentence concurrently or consecutively. 18 USC
13 Section 3584(a) says, "If a term of imprisonment is
14 imposed on a defendant who is already subject to an
15 undischarged term of imprisonment, the terms may run
16 concurrently or consecutively."

17 The statute counsels that, "The Court, in
18 determining whether the terms imposed are to be
19 ordered" -- and I'm quoting here from 3584(b). "The
20 Court, in determining whether the terms imposed are to
21 be ordered to run concurrently or consecutively, shall
22 consider as to each offense for which a term of
23 imprisonment is being imposed," the factors set forth
24 in Section 3553(a).

25 The Court retains the discretion to vary from

1 the guidelines where "the factors relevant" -- and I'm
2 quoting the Schumacher case -- "factors relevant to the
3 sentencing have not been addressed adequately by the
4 guidelines."

5 So there it sounds like they were talking about
6 departure rather than varying. But I think what the
7 defendant is arguing is not that I depart from the
8 guidelines, but that I vary from the guidelines.

9 So the way I understand the situation -- and we
10 can just see if we have an agreement on this, and then
11 we can argue about what we should do -- is that the
12 statute gives me discretion, and the guidelines, the
13 proper guidelines, is that they run consecutively. But
14 I can also vary under Booker or Kimbrough from those
15 guidelines and can also run them either consecutively
16 or concurrently.

17 Would you agree with my understanding of the
18 law, Mr. Lowry?

19 MR. LOWRY: Absolutely, Your Honor.

20 THE COURT: Do you agree with that, as well?

21 MS. ARMIJO: Yes, Your Honor.

22 THE COURT: All right. So you can argue it
23 now, separately from your remarks on behalf of
24 Mr. Baca, or you can include them in your remarks of
25 Mr. Baca. But it's up to you how you want to proceed,

1 Mr. Lowry.

2 MR. LOWRY: Well, Your Honor, if I may.

3 THE COURT: Mr. Lowry.

4 MR. LOWRY: Thank you, Your Honor. And I
5 apologize, Mr. Baca was speaking with me.

6 THE COURT: That's all right.

7 MR. LOWRY: When you're saying my remarks
8 about Mr. Baca, you're talking about the first factor
9 under 3553, that nature and circumstances of the
10 offense and the characteristics of the defendant, or
11 would you clarify for me what you mean by my remarks
12 about Mr. Baca?

13 THE COURT: Well, at some point I'm just
14 going to turn it over to you to make remarks on behalf
15 of Mr. Baca. And you can either sweep all this about
16 whether it's concurrent or consecutive into those
17 remarks, or we can take it up separately. However
18 you'd like to proceed.

19 MR. LOWRY: I'd like to sweep it all
20 together, if you will, Your Honor.

21 THE COURT: You're about to make
22 arguments -- well, on behalf of Mr. Baca, and I'll just
23 hear your "concurrent" or "consecutive" at that time.

24 MR. LOWRY: Yes, Your Honor.

25 THE COURT: Mr. Lowry.

1 MR. LOWRY: Your Honor, as you pointed out,
2 the Court is vested with the discretion to impose a
3 sentence it sees fit under the nature and circumstances
4 of the current offenses. And really, the gestalt of
5 our argument for concurrent sentences is frankly what's
6 the point of adding life sentences on top of life
7 sentences? Because if you're serving a single life
8 sentence, short of imposing the sentence of death, that
9 life sentence essentially incorporates all of the
10 3553(a) factors that the Court needs, and a single life
11 sentence is sufficient to compensate for those factors.

12 What we've done in the brief is basically to
13 peel back and look at the nature and circumstances of
14 the offense. And without belaboring it, we have
15 maintained Mr. Baca's innocence with regard to the
16 Molina murder and the Marcantel conspiracy. And we all
17 sat through the trial; we understand that.

18 But I just think it bears noting, you know, to
19 look at -- we've been talking about it this morning,
20 even in the sense with the vulnerable victim, with this
21 idea that Mr. Baca ordered this hit to take place on
22 Mr. Molina. And I think it's just worth emphasizing
23 that after Mr. Baca spoke with Mr. Urquizo in the year
24 of 2012, and Mr. Urquizo claims to have had this
25 conversation that frankly was impossible to have taken

1 place through the cell window, and Mr. Urquizo
2 disappears not to Southern but to the Southern facility
3 in Level 6 in Santa Fe.

4 Mr. Baca was transported by the Department of
5 Corrections in January of 2013 from PNM Level 6 North
6 facility directly to Southern and placed in the blue
7 pod where he lived with Mr. Molina on the same pod,
8 where they could shake hands, eat lunch together, with
9 all the same SNM cast of characters that, you know,
10 other ultimately came to mete out his death.

11 And so what we're saying it if this theory was
12 true or plausible, it seems to me there was no real
13 compelling reason for Mr. Molina not to be killed when
14 Mr. Baca was actually on the pod.

15 I mean, if we take the government's theory --
16 and I'm not trying to impeach the jury's verdict. I
17 know and respect that verdict. But it seems to me that
18 if that were to be the case, that Mr. Baca was there in
19 person and could have directed that himself. He didn't
20 need to wait for Mr. Urquizo to show up, you know,
21 almost a year and a half later to do the dirty work.

22 And we know from the 1989 murder of Mr. Vasquez
23 at PNM, the old PNM main that, you know, if somebody
24 gave him the right circumstance, to kill him, he
25 wouldn't -- you know, he would do so.

1 So I just have a pragmatic problem with the way
2 the whole chronology of events is structured, because
3 it sort of undermines the theory that Mr. Baca wanted
4 Molina murdered.

5 And so I just think the Court, sort of in
6 equitable principles, can take this into consideration
7 when we're deciding whether this was something that we
8 can attribute to him in some kind of -- and I'm not
9 trying to undermine the instance of murder, but there's
10 no apparent sense of malice on his part that he wanted
11 him dead and he wanted him dead immediately, like we've
12 heard the Court quote from the testimony of Lupe
13 Urquizo and others, who unfortunately were paid by the
14 government to testify favorably for the prosecution, as
15 we know.

16 So, I mean, I just have -- you know, despite the
17 jury's verdict, I guess I'm biased in favor of my
18 client. I still have a little heartburn over the
19 chronology of events, and I don't think it speaks to
20 the level of maliciousness that we want to see to
21 impose multiple life sentences against an individual.

22 And the same thing sort of comports when we talk
23 about the Marcantel conspiracy. We saw through the
24 audios that were played, and you heard Mr. Baca, in his
25 own voice, characterize him as the figurehead for the

1 department. He's just a puppet being fed information
2 by others. And it wasn't in a period of days after
3 Eric Duran turns off this recorder and stops recording
4 Mr. Baca entirely, only after that period of days when
5 he starts resuming the conversations with Mr. Baca and
6 recording them do we hear a change of heart in
7 Mr. Baca. And our theory has always been that it took
8 Eric Duran's consistent persuasion to entrap Mr. Baca
9 into accepting this theory as a good idea or a viable,
10 you know, scheme to pull off.

11 So obviously Mr. Baca has lived a life that's
12 very different from you or I or regular folks in this
13 courtroom, Your Honor, and it's been a hard-scrabble
14 life, to say the least.

15 But what I'm suggesting to the Court is it isn't
16 a kind of, you know, just stone-cold, "I want to kill
17 you for the sake of killing you," that the sentence of
18 multiple life sentences would necessitate to reflect
19 adequately, you know, societal -- society's -- I don't
20 know. I don't know of another word, other than
21 vengeance, frankly.

22 Because if you look at all the sentencing
23 factors, a life sentence, one, standing on its own, is
24 enough to promote all the 3553(a) factors. Because a
25 life sentence, you know, that shows the seriousness of

1 the offense, in and of itself, and it's enough to
2 develop respect for the law and enough to provide
3 deterrence not only for the public but for Mr. Baca.

4 You know, there's no need, past a life sentence,
5 for any kind of vocational or medical or any kind of
6 corrective behavior to impose. And it's -- of the kind
7 of sentences imposed, life under federal law, it's
8 mandatory. I mean, there's really no other kind of
9 sentence we have at hand. So that's kind of a moot
10 point if we look at 3553 -- I believe it's 4.

11 Now, where we really differ, and I think where
12 the Court is going to come down on this, is sort of
13 judging the policy considerations that we see in the
14 sentencing guidelines as opposed to what the Court has
15 the discretion to impose. And frankly, in looking at
16 that, you know, my thoughts went back to a Law Day
17 luncheon we had in Albuquerque years ago where Justice
18 Henry spoke, and Justice Henry, during that talk, he
19 quoted Justice Benjamin Cardoza out of, "The Nature of
20 the Judicial Process," a book he wrote. And Cardoza's
21 philosophy with regard to the courts -- and I'll quote
22 this. It says, "Be it my will that my justice be ruled
23 by mercy."

24 And it really goes to sort of my thinking on
25 this, that the Court is in a position to bring some

1 enlightened view of what is pragmatically possible. I
2 mean, I don't know that multiple life sentences really
3 serves any other real purpose, other than trying to
4 send a signal to somebody that they're -- you know,
5 you're going to -- you can't die multiple times. And
6 the pragmatic reality of you running these sentences
7 concurrently means that Mr. Baca is going to die in
8 federal prison at some point.

9 I mean, it's my understanding that it's very
10 difficult, if not nearly impossible, for the State to
11 parole somebody off of a life sentence due to a murder
12 charge. It happens, but it happens very rarely. And I
13 doubt it would happen under the circumstances of
14 Mr. Baca's 1989 murder conviction.

15 And I can't -- I have no control over that, Your
16 Honor. I'm not going to kid the Court or my colleagues
17 that I do. But I think that what I've been made to
18 understand here today is that, you know, the United
19 States and the Department of Justice will try to have
20 the State cede primary jurisdiction over Mr. Baca in
21 order to get him to the Bureau of Prisons.

22 My understanding of the sentencing guidelines is
23 the imposition of a life sentence means roughly, at a
24 minimum, 470 months, which is just over 39 years. And
25 even if you factor in, you know, time for good time,

1 which I doubt you get under a life sentence, would mean
2 he'd serve over -- in excess of 33 years on top of his
3 current age. He's not going to -- he's not going to
4 make it out of federal prison, Your Honor. He's going
5 to unfortunately pass away living in the confines of a
6 federal penitentiary for the rest of his life.

7 And so I just see that the imposition of a
8 concurrent sentence is really -- I won't say much to do
9 about nothing, because I'm not naive about the
10 seriousness of a murder conviction. But what I do
11 think it could speak to is the Court's capacity for
12 mercy for anybody, for anybody under the circumstances.

13 And it doesn't mean you're going off lenient or
14 light on Mr. Baca, because a concurrent sentence
15 results in his death in a federal penitentiary at best.
16 And at worse, it might result in his death in a State
17 facility, if the State doesn't waive primary
18 jurisdiction and maintains his life imprisonment there.

19 So it doesn't really change his fate to run them
20 consecutive or concurrent. It's just a matter of --
21 from my perspective, a matter of judicial philosophy
22 and temperament of what the will of the Court is under
23 the nature and circumstances of this case.

24 And because I think that the case against
25 Mr. Baca with regard to the Molina murder was weak, and

1 the Court knows the sentiment of counsel from reading
2 all the briefs and the motions for new trial and
3 everything, but -- and because I think he was, as we
4 said in our sentencing objections, cajoled into the
5 Mercantel conspiracy, I just think the Court could
6 exercise its considerable discretion and impose these
7 sentences to run concurrently rather than
8 consecutively, Your Honor.

9 THE COURT: All right. Thank you,
10 Mr. Lowry.

11 Mr. Baca, you have an opportunity to speak on
12 your own behalf before sentence is imposed this
13 afternoon. What would you like to say to the Court and
14 what would you like the Court to consider before it
15 imposes sentence this afternoon?

16 THE DEFENDANT: I have nothing to say, Your
17 Honor.

18 THE COURT: All right. Thank you, Mr. Baca.

19 Ms. Armijo, remarks on behalf of the United
20 States and particularly what the United States'
21 position is on this consecutive and concurrent issue?

22 MS. ARMIJO: Yes, Your Honor. I believe
23 Ms. Molina wanted to make a statement, and she stepped
24 out, and I think they're going to check to see if she's
25 still there.

1 THE COURT: Ms. Molina, do you want to come
2 to the podium at this time? All right. Ms. Molina.

3 MS. MOLINA: Thank you, Your Honor.

4 THE COURT: Ms. Molina.

5 MS. MOLINA: First, I would like to
6 apologize to you. The last time that I was here with
7 Dan Sanchez, the last thing I said was I feel sorry for
8 you. I wouldn't want to be a judge. And by that, I
9 just -- I want to explain.

10 I can't imagine how it is for you, how hard it
11 is for you to sit and listen to testimony over and over
12 again and have to decide somebody's -- so please accept
13 my apologies.

14 THE COURT: No, no apologies necessary.

15 MS. MOLINA: Afterwards, I was like, oh, no,
16 that didn't sound too good. I was all in tears, and --

17 THE COURT: That's fine.

18 MS. MOLINA: I'll be brief. I've waited a
19 long time for this. And, you know, most people, they
20 write a statement, and, you know, I want to write a
21 book about how this affected my life and my children's,
22 my grandkids, my nieces, my -- my whole family.

23 I love my family more than anything, and I'm
24 sure everybody can identify with that. I asked if it
25 was allowed to address Mr. Baca, and they said yes.

1 So I don't have much to say, except that you
2 really, really affected my life and my family's life.
3 And we went through pain, and we suffered, and we still
4 are.

5 Today is my youngest daughter's birthday. She's
6 34, and I'd like to be over there baking her cake. But
7 I'm here, wasting more of my time, because I have a
8 life. I mended; I came back.

9 My son and I had the same. We went through a
10 lot together. He was in prison for a long time, and
11 he'd say, "Mom, we'll come through this with our feet
12 flat on the ground and our head held high."

13 And to that, to this day, that's what I am now.
14 And I no longer -- no longer am going to shed any
15 tears. I'm not going to feel any pain for your
16 actions.

17 My son would have had a birthday in August.
18 That's never going to happen. He would have been 36.
19 This has been, what, five years. So with that, all I
20 have to say is I'll never forgive you for what you did.

21 But I refuse, I refuse, from now on, to me -- I
22 asked if this was allowed, to say it in a nice way.
23 You're like a bowel movement to me, something to be
24 flushed and never to feel pain or hurt again.

25 And that's all I have to say, Your Honor.

1 THE COURT: All right. Thank you,
2 Ms. Molina.

3 MS. MOLINA: You're welcome.

4 THE COURT: Ms. Armijo, further remarks by
5 the government?

6 MS. ARMIJO: Yes, Your Honor. Mr. Lowry put
7 the government's actions in terms of vengeance, and I
8 think that the more proper term is justice and
9 punishment, not vengeance. It's justice for a life
10 that was taken way too short, and brutally taken, as
11 you may recall.

12 I was reading the autopsy again this morning.
13 Mr. Molina was stabbed 43 times as he fought for his
14 life, and he lost that battle.

15 And for a concurrent sentence, it's basically
16 sending a message of nondeterrence. That's a message
17 that you can be serving a life sentence, you can put
18 hits out on people, as a leader of the gang, the person
19 that is in charge of this gang, you can have people
20 killed, and you're not going to get any additional time
21 for this. You're not going to get any other
22 recognition.

23 I agree that he is going to die, absent winning
24 an appeal, in federal custody. But there needs to be
25 some sort of message sent out to the streets, if the

1 leader of the SNM gang gets a free ride on this murder
2 and on the conspiracies to murder two other
3 individuals.

4 As to Mr. Lowry's argument that Mr. Baca could
5 have taken care of the murder himself when he was
6 housed at Southern, you have to put it in -- and I'm
7 sure the Court will remember where the SNM was back at
8 that time. As you may recall the testimony of Jerry
9 Rourke talking about the SNM was being held down at
10 Southern, and they were slowly trying to work with the
11 SNM, and Mr. Baca was removed and sent back up to PNM,
12 and Mr. Baca wrote a letter to Mr. Rourke trying to
13 negotiate things with Mr. Rourke, and Mr. Rourke
14 actually met with him in early 2014, but he didn't
15 believe that the defendant was sincere about calling a
16 truce and having peace.

17 He said that Mr. Baca would not totally commit
18 to some of his things, and so they did move him back to
19 Southern, and it was shortly after that that we have
20 Javier Molina killed.

21 Now, as Mr. Baca himself said to Eric Duran, and
22 as we played, "If they would have let me out, Javier
23 wouldn't be a dead man. That man would still be alive.
24 But they didn't and that's -- what's done is done.
25 They called my bluff, and now they have a dead man on

1 their hands."

2 Those are the words of the defendant that we
3 heard during the trial. And that just shows his power,
4 his lack of indifference for human life, how he really
5 was upset at that point in time with Corrections and
6 the power that he yielded.

7 And that goes on to continue for the murders --
8 to kill Marcantel and Sanistevan. He may have not
9 known Greg Marcantel, because Greg Marcantel became the
10 head when he was out. But you can't say that about
11 Dwayne Sanistevan.

12 Dwayne Sanistevan was a person that worked in
13 Corrections, that had been there for a very long time,
14 that knew the defendant very well, and he certainly
15 knew of who Dwayne Sanistevan was.

16 So that certainly cannot be, you know -- it's
17 not just a puppet. That was something that was very
18 personal. It was very personal that he killed Javier
19 Molina. He knew Javier Molina.

20 The reason -- the reason that Mr. Baca also
21 didn't kill him is because, as the Court knows, there
22 are soldiers. He is the head of the SNM. He had other
23 leaders underneath him. And then, of course, we know
24 that there are soldiers and people that have to earn
25 their bones, and that's exactly what happened in this

1 case. We have -- the actual people that did the
2 stabbing, the shanking, were people that purposely were
3 put to that task because they had not earned their
4 bones, because they had to prove themselves to be a
5 member the SNM.

6 Mr. Baca had already proved himself when he
7 committed a brutal murder in Corrections back in the
8 late '90s. So he was not one to get his own hands
9 dirty, but that's not to say that he is not responsible
10 for the murder any less than the people who actually
11 did it themselves.

12 In fact, I would say, much like Billy Garcia
13 said yesterday, it all starts at the top. And in this
14 case, it starts at the top with Mr. Baca.

15 So we are asking the Court to recognize that
16 this was a separate life, a separate murder, that he
17 needs to -- if you look at the -- under 3553, the
18 nature and the circumstance of the offense and the
19 history and characteristics of the defendant.

20 I think the Court heard -- let's just stick with
21 nature and characteristics of the defendant. You have
22 his criminal history. You heard over and over, not
23 just in his own trial, I think there was testimony in
24 other trials, as well, about Anthony Baca, about what
25 Corrections did, about the murders that he committed,

1 about the hits that he put out on people, not just the
2 ones that have charged. There were other hits. As I
3 was reading back through people's testimony, they
4 talked about hits he put on other people.

5 There certainly is nothing that justifies a
6 concurrent sentence based on his own characteristics
7 and certainly not on the nature and the circumstances
8 of the offense, the brutal murder of Javier Molina.

9 The need to reflect the seriousness of the
10 offense, to promote respect for the law, and to provide
11 just punishment for the offense and adequate
12 deterrence, that alone, again, Your Honor, the message
13 that needs to be sent is that this type of activity
14 should not be allowed anywhere. And certainly as
15 leader of the gang, he needs to be the example set that
16 consecutive sentences, much like you did with Daniel
17 Sanchez and with other people before him who were under
18 him, he certainly deserves -- he, being Mr. Baca,
19 deserves a sentence that is consecutive to what he is
20 serving.

21 And so with that, Your Honor, we would certainly
22 argue that in this circumstance, much more than other
23 circumstances, that the sentence should be consecutive
24 to what he is serving. And so with that, we ask that
25 you sentence him to life and, of course, to the maximum

1 term for the two conspiracies to commit murder, as
2 well.

3 THE COURT: All right. Thank you,
4 Ms. Armijo.

5 All right. I will now state the sentence, but
6 the attorneys will have a final chance to make legal
7 objections before sentence is imposed.

8 The Court adopts the presentence report factual
9 findings. We've made a handful of changes this
10 morning; and with those changes, the Court will adopt
11 those as its -- the ones in the PSR as its own. Most
12 of them are undisputed, and I've dealt with the ones
13 where we've gone through and specifically made changes.

14 The court has also consider the sentencing
15 guideline applications in the PSR. The Court, having
16 overruled the objection, the Court now adopts those as
17 its own, as well. And I will issue a short opinion on
18 the vulnerable victim testimony or the evidence and why
19 I'm ruling the way I am.

20 The Court has also considered the factors set
21 forth in 18 USC Section 3553(a) 1 through 7. There is
22 both a guideline sentence and a statutory sentence as
23 to some of the counts, and then there's a guideline
24 sentence for other of the counts. So I have considered
25 those, including the finding that the defendant is a

1 career offender.

2 As I indicated earlier, after overruling the
3 objection on vulnerable victim, the offense level is
4 43, and the criminal history category is 6. Pursuant
5 to 5(g)1.1, the guideline imprisonment term is 120
6 months as to Counts 6, 9 and 10. As to Count 7, the
7 guideline imprisonment term is life, which is
8 consistent with the statutory provision of mandatory
9 life imprisonment.

10 The Court notes the defendant is a member of the
11 Sindicato de Nuevo Mexico (SNM) prison gang, many
12 members of which conspired to and/or did commit various
13 crimes that were indicted under the Racketeering
14 Influenced and Corrupt Organizations (RICO) Act.
15 Specifically, the defendant, a high-ranking leader in
16 the SNM gang, ordered the murder of SNM member JM,
17 which was ultimately carried out.

18 In addition, he ordered the murders of the DS
19 and GM, two high-ranking officials with the State of
20 New Mexico. The defendant recruited other SNM members
21 to carry out his orders while he was in custody.

22 The Court has, as I think this record will
23 reflect, and also the opinion that I will be issuing
24 about the vulnerable victim enhancement, will reflect
25 that the Court has carefully considered the guidelines,

1 but in arriving at a sentence, the Court has taken into
2 account not only the guidelines but other sentencing
3 goals. Specifically, the Court has considered the
4 guideline sentencing range established for the
5 applicable category of the offense committed by the
6 applicable category of defendant.

7 And the Court concludes that the punishment
8 that's set forth in the guidelines is appropriate for
9 this sort of offense. I have considered the kinds of
10 sentence and range established by the guidelines, and
11 the Court agrees that the sentence of 120 months as to
12 Counts 6, 9 and 10, and life imprisonment as to Count 7
13 are adequate but also necessary to reflect the
14 seriousness of the offenses, to promote respect for the
15 law, provide just punishment, afford adequate
16 deterrence both at a specific and general level,
17 protect the public. They are a guideline sentence, so
18 they avoid unwarranted sentencing disparity among
19 defendants with similar records who have been found
20 guilty of similar conduct. And because I will be
21 imposing supervised release, the sentence will
22 effectively provide the defendant with some needed
23 education and training and care to assist him, if he is
24 released, reintegrating back into society.

25 The Court believes that the guideline sentence

1 fully and effectively reflects each of the factors
2 embodied in 18 USC Section 3553(a) and produces a
3 reasonable sentence; and by that, I mean one that is
4 sufficient without being greater than is necessary to
5 comply with the purposes of punishment set forth in the
6 Sentencing Reform Act.

7 Therefore, as to each of Counts 6, 9 and 10
8 of the second superseding indictment,
9 2:15-cr-04268-021-JB, the defendant, Anthony Ray Baca,
10 a/k/a "Pup," is committed to the custody of Bureau of
11 Prisons for a term of 120 months.

12 As to Count 7, the defendant is committed to the
13 custody of Bureau of Prisons for a term of life
14 imprisonment without release. Said terms shall run
15 concurrently for a total term of life.

16 The defendant is placed on supervised release
17 for a term of three years as to each count. Said terms
18 shall run concurrently. The defendant must comply with
19 the mandatory and standard conditions of supervision.

20 And I do think that I will follow the guidelines
21 in this case. I don't have a Kimbrough disagreement
22 with the guidelines. And so these sentences will run
23 concurrently to his State sentence.

24 The following special conditions will also be
25 imposed. I will -- let's see. I'll state the first

1 one, then I'll give the reason for it.

2 First, you must submit to a search of your
3 person, property, residence, vehicle, papers,
4 computers, as defined in 18 USC Section 1030(e)(1),
5 other electronic communications or data storage devices
6 or media or office under your control.

7 The probation officer may conduct a search under
8 this condition, only when reasonable suspicion exists,
9 in a reasonable manner, at a reasonable time, for the
10 purpose of detecting drugs, firearms, ammunition, any
11 other dangerous weapons and any other contraband.

12 You must inform the residents or occupants that
13 the premises may be subject to a search. This
14 condition is imposed based on the nature and
15 circumstances of these federal offenses for which
16 you're being sentenced today, which involved a RICO
17 conspiracy, in which the defendant ordered hits on
18 another SNM member and two high-ranking State of New
19 Mexico officials.

20 This condition is also imposed based on the
21 history and characteristics of the defendant, who has a
22 history of violent behavior, to include armed robbery,
23 manslaughter, battery on a police officer, and murder.

24 Moreover, as a convicted felon, the defendant is
25 barred from possessing firearms and ammunition.

1 Last, this condition is meant to deter the
2 defendant from reengaging in violent crimes and to
3 protect the public from such crimes that the defendant
4 if he is ever released from custody.

5 I will now state two conditions, and then I will
6 give the justification for those two conditions.

7 First, you must not communicate or otherwise
8 interact with codefendants, coconspirators. And
9 second, you must not communicate or otherwise interact
10 with any known gang members.

11 These two conditions are imposed because of the
12 nature and circumstances of the federal offenses for
13 which you are being sentenced today, which involved a
14 RICO conspiracy among SNM members, including the
15 defendant, to commit murders and assaults.

16 These two conditions are also imposed based on
17 the history and characteristics of the defendant, who
18 had leadership status within the SNM, and he used that
19 leadership to order other SNM members to conduct hits
20 on three victims.

21 Additionally, these conditions are meant to
22 deter the defendant from entering into new
23 conspiracies, similar to the federal offenses for which
24 he's being sentenced today, with other gang members and
25 to protect the public from further criminal schemes of

1 the defendant covered by the RICO Act.

2 Next, you must reside in a residential reentry
3 center for a term of six months. You must follow the
4 rules and regulations of this center. This condition
5 is imposed based on the history and characteristics of
6 the defendant who has been in continuous custody since
7 1987.

8 If the defendant is ever released from custody,
9 this condition will provide him a stable environment
10 where he can successfully reintegrate into the
11 community while giving him time to find a suitable
12 residence.

13 Next, you must not communicate or otherwise
14 interact with the victim or victims either directly or
15 through someone else. This condition is imposed in an
16 effort to protect the victims and the victim's
17 families.

18 I will now state five other special conditions
19 that are being imposed, and then I will give -- and
20 these are the five final ones. And then I will give
21 the justification for these five final conditions after
22 I have stated them.

23 First, you must participate in an outpatient
24 substance abuse treatment program and follow the rules
25 and regulations of that program. The probation officer

1 will supervise your participation in the program,
2 provider, location, modality, duration, intensity, etc.
3 You may be required to pay all or a portion of the cost
4 of the program.

5 Second, you shall waive your right of
6 confidentiality and allow the treatment provider to
7 release treatment records to the probation officer and
8 sign all necessary releases to enable the probation
9 officer to monitor your progress. The probation
10 officer may disclose the presentence report any
11 previous substance abuse evaluations and/or other
12 pertinent treatment records to the treatment provider.

13 Third, you must submit to substance abuse
14 testing to determine if you have used a prohibited
15 substance. Testing may include urine testing, the
16 wearing of a sweat patch, a remote alcohol testing
17 system, an alcohol monitoring technology program,
18 and/or any form of prohibited-substance screening or
19 testing. You must not attempt to obstruct or tamper
20 with the testing methods. You may be required to pay
21 all or a portion of the cost of the testing.

22 Fourth, you must not use or possess alcohol.

23 And fifth, you must not possess, sell, offer for
24 sale, transport, cause to be transported, cause to
25 affect interstate commerce import or export any drug

1 paraphernalia as defined in 21 USC Section 863(d).

2 These five conditions are imposed because of the
3 history and characteristics of the defendant who has a
4 prior arrest for possessing drug paraphernalia and
5 heroin. If the defendant is ever released from
6 custody, these conditions are meant to ensure he
7 receives the necessary treatment for any substance
8 abuse issues he may have.

9 The Court finds the Mandatory Restitution Act of
10 1996 is applicable in this case. However, no claim for
11 restitution has been made by the victim or victims in
12 this case. Therefore, none will be ordered.

13 Based on the defendant's lack of financial
14 resources, the Court will not impose a fine or a
15 portion of a fine. The Court carefully considered
16 other alternative sanctions in lieu of a fine, such as
17 residential reentry center, GPS or location monitoring
18 and community service. In accordance with USSG
19 Section 5(e)1.2(E), the Court has imposed a special
20 condition that the defendant reside at a residential
21 reentry center.

22 The Court concludes the total combined sanctions
23 without a fine or alternative sanction, other than the
24 defendant reside at a residential reentry center, is
25 sufficiently punitive.

1 The defendant shall pay a special assessment of
2 \$100 as to each count of conviction for a total of
3 \$400, which is due immediately.

4 And in addition to not having a Kimbrough
5 disagreement with the guidelines to run it consecutive
6 to the state sentence, the Court thinks the 3553(a)
7 factors support not varying in this case. Several
8 factors, such as the seriousness of the offense,
9 promoting respect for the law, providing just
10 punishment, all three of those weigh in favor of not
11 varying in this case.

12 Let me ask both counsel if they know of any
13 reason why the sentence should not be imposed as the
14 Court has stated it, other than what may have been
15 argued to the Court.

16 Ms. Armijo?

17 MS. ARMIJO: No, Your Honor, thank you.

18 THE COURT: Mr. Lowry?

19 MR. LOWRY: Not at this time, Your Honor.

20 THE COURT: All right. It is ordered that
21 the sentence is imposed at the Court has stated it.

22 Mr. Baca, you can appeal your conviction if
23 there was anything unlawful or involuntary or anything
24 that was -- there's some fundamental defect in the
25 proceedings that was not waived along the way, you can

1 appeal all those things.

2 You also have a statutory right to appeal your
3 conviction under certain circumstances, particularly if
4 you think the sentence is contrary to law.

5 You have the right to appeal in forma pauperis,
6 and what that means is the Clerk of the Court will
7 prepare and file a notice of appeal upon your request
8 if you're unable to pay the cost of an appeal. And the
9 Clerk of the Court will prepare that notice for you.

10 With very few exceptions, any notice of appeal
11 must be filed within 14 days of the entry of judgment.

12 Mr. Baca, do you understand your rights to
13 appeal?

14 THE DEFENDANT: Yes, I do, Your Honor.

15 THE COURT: All right. Counsel, you have
16 copies of the presentence report. There are two of
17 them in this case, as well as Mr. Mills' memo of
18 June 6th, and you have the addendum.

19 Anything further on this matter? Ms. Armijo?

20 MS. ARMIJO: No, Your Honor, thank you.

21 THE COURT: Mr. Lowry? Ms. Duncan?

22 MR. LOWRY: No, Your Honor.

23 Your Honor, we do have one matter. I spoke to
24 Ms. Armijo beforehand. We'd like to make an oral
25 motion for Mr. Baca to continue possession of the

1 tablet throughout the appellate process. I see that
2 other teams are doing that. If you'd prefer a formal
3 written motion, we can do that.

4 THE COURT: It's up to you. And,
5 Ms. Armijo, you haven't been opposing these, if I
6 understand it correctly.

7 MS. ARMIJO: We have not be opposing them.
8 I think that the orders came down for them to make sure
9 that the facilities would allow them to have it in the
10 Bureau of Prisons. That's the only reason that other
11 people entered an order.

12 THE COURT: Yeah, I can help you out until
13 they're turned over to the BOP, and then I'm kind of
14 limited after that. But if you want to submit an order
15 or if you want me to just make an oral order, I've been
16 talking to the Marshal's Service up in Albuquerque, and
17 they say there shouldn't be any problem, and they don't
18 have any problem complying with that order.

19 MR. LOWRY: That's fine, Your Honor. I'll
20 tender a stipulated order to counsel and get it to you.

21 THE COURT: That's fine.

22 Anything else, Mr. Lowry? Ms. Duncan?

23 MR. LOWRY: No, Your Honor.

24 MS. DUNCAN: No, Your Honor.

25 THE COURT: Counsel, I appreciate your

1 assistance on this matter.

2 Mr. Baca, if you get me reversed, we may see
3 each other again.

4 THE DEFENDANT: I hope so.

5 THE COURT: You hope so. You just have so
6 much fun with me, don't you?

7 THE DEFENDANT: I kind of miss the pizza.

8 THE COURT: Is Mr. Acey buying?

9 THE DEFENDANT: Yeah.

10 MR. LOWRY: They have a lunch date.

11 THE COURT: All right. Well, Mr. Baca, if I
12 don't see you again, good luck to you.

13 THE DEFENDANT: Same to you, Your Honor.

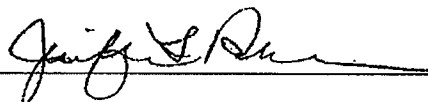
14 THE COURT: All right. Thank you, Mr. Baca.
15 We'll been in recess.

16 [Court in recess at 1:05 PM.]
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REPORTER'S CERTIFICATE

I, Jenifer L. Russin, CCR #182, a Certified Court Reporter, do hereby certify that the proceedings of the above-entitled cause were reported by me stenographically and that the within transcript is a true and accurate transcription of my shorthand notes.

I FURTHER CERTIFY that I am neither an attorney nor counsel for, nor related to or employed by any of the parties to the action, and that I am not a relative or employee of any attorney or counsel employed by the parties hereto, or financially interested in the action.



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